STATE OF MICHIGAN

COURT OF APPEALS

RUTH FUNDERBURK,

Plaintiff/Counter-Defendant-Appellant,

v

FIFTH THIRD BANCORP,

Defendant/Counter-Plaintiff-Appellee.

UNPUBLISHED
December 28, 2010

No. 294022
Kent Circuit Court
LC No. 09-001281-CH

Before: BECKERING, P.J., and TALBOT and OWENS, JJ.

PER CURIAM.

Ruth Funderburk contests the circuit court order dismissing her claims against Fifth Third Bankcorp (hereinafter "the Bank") and the distribution of monies she paid into an escrow account in this action pertaining to a home foreclosure. We affirm.

Funderburk and her former husband purchased a home in 1990, which was financed with two loans from Old Kent Bank and secured by mortgages on the residence. Fifth Third Bank acquired Old Kent Bank and all of its assets. Funderburk and her husband divorced in 2005, and the Bank discovered that taxes on the property were delinquent. The Bank paid the taxes. In April 2006, the Bank initiated a foreclosure on the first mortgage. The property was ultimately redeemed by the Bank. The Bank commenced foreclosure proceedings in December 2006 on the second mortgage and, in March 2007, the Bank purchased the property.

Funderburk initially filed a lawsuit against the Bank in circuit court. The parties stipulated to dismiss that lawsuit and Funderburk continued to occupy the property. The Bank filed an action to terminate Funderburk's tenancy in district court. The district court entered an escrow order requiring Funderburk to make monthly payments to the court clerk. It is undisputed that Funderburk made only three of the required payments.[1] In February 2009, while

[1] Funderburk was ordered to pay $799.05 to the district court on or before February 19, 2009. Thereafter, she was required to pay $1,065.45 to the court on or before the first day of each

the district court lawsuit was pending, Funderburk filed a complaint in circuit court alleging breach of the mortgage contract for failure to provide adequate notice of foreclosure and initiation of foreclosure without default. The parties subsequently stipulated to pursue all claims in the circuit court, and an order was entered staying the district court proceedings and continuing the escrow order.

This appeal concerns the circuit court's order dismissing Funderburk's claims and disbursing the escrow monies to the Bank. The circuit court entered an order granting a default judgment in favor of the Bank following a hearing on its motions alleging Funderburk's failure to make payments in accordance with the escrow order and to produce documents requested during discovery to support her claims that she was not in default on the mortgage. In addition to entering the default judgment, the trial court dismissed Funderburk's claims with prejudice, ordering Funderburk to pay $3,196.35, and releasing the escrow funds to the Bank.

This Court reviews for an abuse of discretion a trial court's dismissal of an action for failing to comply with a court order.[2] "An abuse of discretion occurs when the trial court's decision is outside the range of reasonable and principled outcomes."[3] Issues pertaining to the distribution of escrow funds are also reviewed for an abuse of discretion.[4]

Although "[t]he law favors the determination of claims on their merits . . . [d]ismissals and defaults are the system's mechanism for sanctioning those whose conduct does not fall within the confines of the rules."[5] As recognized by our Supreme Court:

> Trial courts possess inherent authority to sanction litigants and their attorneys, including the power to dismiss a case. "This power is not governed so much by rule or statute, but by the control necessarily vested in courts to manage their own affairs so as to achieve orderly and expeditious disposition of cases." Moreover, MCL 600.611 grants circuit courts "jurisdiction and power to make any order proper to fully effectuate the circuit courts' jurisdiction and judgments," and MCR 2.504(B)(1) provides that if a plaintiff fails to comply with court rules or a court order, a defendant may move to dismiss the action.[6]

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subsequent month. Funderburk paid the initial $799.05 on February 20, 2009. On March 9, 2009, she paid $1,065.12 and $0.33. The last payment made by Funderburk was on April 7, 2009, in the amount of $1,065.45. No further payments were remitted by Funderburk or received by the court after April 7, 2009.

[2] *Woods v SLB Prop Mgt, LLC*, 277 Mich App 622, 630; 750 NW2d 228 (2008).

[3] *Moore v Secura Ins*, 482 Mich 507, 516; 759 NW2d 833 (2008).

[4] See *Hall v Harmony Hills Recreation, Inc*, 186 Mich App 265, 270; 463 NW2d 254 (1990).

[5] *Shawl v Spence Brothers, Inc*, 280 Mich App 213, 240; 760 NW2d 674 (2008) (O'Connell, concurring) (citations omitted).

[6] *Oram v Oram*, 480 Mich 1163; 746 NW2d 865 (2008) (Corrigan, J., concurring), citing *Maldonado v Ford Motor Co*, 476 Mich 372, 376; 719 NW2d 809 (2006).

Funderburk obfuscates the issue by contending the trial court erred in dismissing her claims as a sanction for discovery violations. Yet a reading of the hearing transcript clearly indicates that the trial court's primary basis for dismissal of the lawsuit was due to Funderburk's ongoing failure to comply with the escrow order and clear inability to do so in the future.

Specifically, the Rules of Court provide in relevant part:

> If a party fails to comply with these rules or a court order, upon motion by an opposing party, or sua sponte, the court may enter a default against the noncomplying party or a dismissal of the noncomplying party's action or claims.[7]

The district court ordered Funderburk to make payments into an escrow account on February 9, 2009. The circuit court subsequently, by stipulation of the parties, stayed the district court proceedings and continued the order for escrow payments on May 14, 2009. It is undisputed that Funderburk made only three payments consistent with the escrow order and did not demonstrate even an attempt to maintain compliance with the court-ordered payments or schedule.

We recognize:

> [B]efore dismissing a case, a trial court must "carefully evaluate all available options on the record and conclude that the sanction of dismissal is just and proper. . . . [A] court must evaluate (1) whether the violation was willful or accidental; (2) the party's history of refusing to comply with previous court orders; (3) the prejudice to the opposing party; (4) whether there exists a history of deliberate delay; (5) the degree of compliance with other parts of the court's orders; (6) attempts to cure the defect; and (7) whether a lesser sanction would better serve the interests of justice.[8]

These factors were adequately addressed by the trial court's recognition that Funderburk, despite knowing her inability to comply with the escrow order based on her financial circumstances, entered into the order. The trial court viewed this as willful behavior on Funderburk's part. Of consequence was the long history of litigation and proceedings concerning this property, with Funderburk continuing to reside in the home without rendering any payments, to the prejudice of the Bank. Of considerable importance was the recognition by the trial court that Funderburk lacked the economic resources to meet the financial obligations necessary to retain this property from the outset. No amount of time or lesser sanction would alter Funderburk's financial situation or the ultimate outcome of a foreclosure on the property. While unfortunate, Funderburk's circumstances effectively tied the trial court's hands and precluded any other decision. Although the trial court imposed a drastic sanction, it does not comprise an abuse of discretion.

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[7] MCR 2.504(B)(1).

[8] *Oram*, 480 Mich at 1164 (Corrigan, J., concurring) (citation omitted).

Funderburk also contends the trial court erred in dismissing her complaint as a sanction for discovery violations. The transcript of the hearing suggests that the trial court did consider this in its determination, but that it was not the focus or linchpin for its ruling. The record indicates that, although Funderburk responded to various discovery requests from the Bank, her responses were incomplete. Of significance is the failure of Funderburk to produce documentation in support of her assertion that she was not in default of her contract and that the Bank had access to all such paperwork. As the plaintiff in the circuit court, the onus was on Funderburk to come forward with evidence in support of her assertion that she was not in default of the mortgage. She could not shift that burden to the Bank.

"A plaintiff's burden of proof encompasses two separate concepts: (1) the burden of persuasion, and (2) the burden of going forward with the evidence."[9] While the burden of going forward with the evidence may shift, the burden of persuasion remains with the plaintiff.[10] It was, therefore, incumbent on Funderburk to prove that she was not in default. Given the very open and expansive nature of discovery, Funderburk could not merely assert the relevant proofs were in the Bank's custody. Even assuming the Bank had access to the pertinent materials, Funderburk had available to her the means to obtain all the necessary information through her own discovery. Accordingly, there was no basis or reason to shift the ultimate burden of persuasion regarding Funderburk's lack of default to the Bank. The failure of Funderburk to submit or come forward with any documentation or proofs to support her claims would have ultimately resulted in dismissal of her lawsuit.

Finally, Funderburk challenges the circuit court's disbursement of the escrow funds to the Bank. The proper distribution of the escrow account is contingent on the outcome of the underlying litigation.[11] Because we find the trial court did not abuse its discretion in dismissing Funderburk's claims and granting a default judgment to the Bank, the distribution of monies in the escrow account cannot be deemed improper. Funderburk resided at the property while it was in foreclosure for an extended period of time without the payment of taxes, insurance or the mortgage, resulting in thousands of dollars being expended by the Bank. The amount awarded was minimal in comparison to the costs actually incurred by the Bank obviating any need for an evidentiary hearing.

Affirmed.

/s/ Jane M. Beckering
/s/ Michael J. Talbot
/s/ Donald S. Owens

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[9] *Triple E Produce Corp v Mastronardi Produce, Ltd*, 209 Mich App 165, 175-176; 530 NW2d 772 (1995).

[10] *Id.* at 176.

[11] *Woods v Hall*, 203 Mich App 222, 226; 511 NW2d 715 (1994).